No. 889

In the

Supreme Court of the United States

OCTOBER TERM, 1956

KENNETH TALLEY,

Petitioner,

v.

SEARS, ROEBUCK & COMPANY,

Respondent.

PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Kenneth Talley, respectfully presents this his petition for rehearing of the above entitled cause and prays that this Honorable Court review its order entered on May 21, 1957, denying petitioner's prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above

entitled cause on December 14, 1956, and in support of his prayer for rehearing, petitioner respectfully shows:

The Court of Appeals below, in its statement of the facts of the case at bar and by its decision based on the facts as stated, has so clearly usurped the function of the jury and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision over lower federal courts pursuant to Rule 19(1)(b) of this Court's Rules.

Open and frank distrust of juries is typically portrayed by Dickens in *Oliver Twist* where the beadle is reminded by the undertaker that the verdict of a jury suggested that more care on the part of the relieving officer might have altered circumstances that caused the death of a tradesman from want of the necessities of life.

> " 'Juries,' said Mr. Bumble, grasping his cane tightly, as was his wont when working into a passion: 'juries is ineddicated, vulgar, grovelling wretches.'
>
> " 'So they are,' said the undertaker.
>
> " 'They haven't no more philosophy nor political economy about 'em than that,' said the beadle, snapping his fingers contemptuously.
>
> " 'No more they have,' acquiesced the undertaker.
>
> " 'I despise 'em,' said the beadle, growing very red in the face.
>
> " 'So do I,' rejoined the undertaker."

The opinion of the Court of Appeals below equally demonstrates distrust of the jury verdict which suggests that

petitioner's 20% disability could have been prevented had respondent used more care in furnishing more help *or* better equipment to deliver a 361-pound deep freeze out in the country. For obvious constitutional reasons, however, the opinion below is not open and frank as were Mr. Bumble and the undertaker. To the contrary the court below shrouds from public scrutiny its bumbleistic approach by stating[1]: "Briefly but fully summarized, this is the evidence: * * *." The opinion then, instead of fairly stating the evidence, states only that evidence which would, in the absence of contradictory evidence, apparently justify reversal of the trial judge who entered judgment for petitioner in accordance with the jury verdict.

Not only does the opinion below not set out any of the evidence of record that is favorable to the necessary finding of the jury that two men were insufficient to make the delivery with the equipment furnished, but the opinion flatly states that "There was no evidence that two men were insufficient." That such a statement is clearly erroneous is a matter of record. See R.* 90-93, 96, 107, 193, 212-216.[2] The opinion below further states that "Indeed, both appellee [petitioner] and his assistant testified that two men would be sufficient to load and unload a freezer of the type appellee [petitioner] was handling when injured." But such testimony by petitioner was coupled with

[1]See note 1 of the opinion below, *239 F. 2d 82, 83.*

[2]See the petition for writ of certiorari, pages 9 and 10. R* refers to the record in the Court of Appeals below.

a crucial qualification which the opinion does not mention. In answer to a question as to whether two men are customarily sufficient to load and unload deep freezes, petitioner said, "If they had proper equipment, yes." (R. 90-93. Also see R. 96.) And petitioner testified that the equipment furnished was not adequate. (R. 107.) The person who was petitioner's helper on the date in question said nothing in his testimony which could reasonably be construed to mean what he is credited as testifying to. (See R. 166-170.)[3]

The statement in the opinion below of the evidence of record is a grossly unfair distortion of the record, forcing the result reached while making it appear that the result is not in conflict with applicable Texas court decisions. The Court of Appeals below has not decided at all the real case involved but rather has clearly decided a hypothetical case by picking and choosing evidence from the record and by even tortuous distortion of some of the evidence on which

[3]The opinion prominently sets out (in the statement of the evidence) petitioner's answer to a line of questioning that was repeatedly objected to as an attempt to prove assumption of the risk, a defense not available under Texas law. See *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955)*, where it was held that plaintiff's belief that he could safely cross over an oily floor was evidence bearing on assumption of risk, a defense not available to defendant. Equally prominently set out in the court's statement of the evidence is a similar answer petitioner made to a question asked him on deposition. Petitioner was asked: "Now, at the time you started to lift the freezer, did you have any reservations in your mind about the two of you, you and your helper, being able to handle that job by yourselves?" Petitioner answered: "No, sir, I didn't because we have handled them all the time." Reliance on this deposition testimony is not only subject to the *Robinson* case objection but it is also clear that, under Texas law, deposition testimony has no binding effect other than presenting questions of credibility for the jury where the deposition testimony is later modified or explained by the trial testimony. See *Smith v. Olsen, et al., 92 Tex. 181, 46 S. W. 631*. And see *Mitchell v. Swift and Company, 151 F. 2d 770*, an opinion by the court below.

the decision was based.[4] Such a patent usurpation of trial by jury and perversion of justice should without more cause this Court to exercise its supervisory power over lower federal courts pursuant to Rule 19(1)(b) of this Court's Rule.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Court of Appeals be upon further consideration reversed.

Respectfully submitted,

CECIL L. WOODGATE,
Fidelity Union Life Building,
Dallas, Texas,
Counsel of Record for Petitioner,

and

THOMAS H. HIGHT,
Gulf States Building,
Dallas, Texas,

By C. L. Woodgate

CERTIFICATE OF COUNSEL

I, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

C. L. Woodgate
Counsel for Petitioner

[4]Petitioner is not merely suggesting that the Court of Appeals' opinion leaves much to be desired but rather is contending that the opinion makes clear that the decision reached was based on no other evidence than that which is set out in the court's statement of the evidence. It is the unfairness of that statement which is challenged. Cf. *Gibson v. Phillips Petroleum Co., 1 L. Ed. 2d 77 (1956) (No. 339, Oct. Term, 1956).*

A copy of the foregoing petition for rehearing was on the 12th day of June, 1957, served on Mr. John W. Rutland, Jr., and the firm of Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas, Texas, Attorneys for respondent.